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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH, PETITIONERS,

vs.

E. C. MOORE, I. ZELLERBACH AND A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED MARCH 30, 1942.

CERTIORARI GRANTED APRIL 13, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1083

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

LB C 7558

E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

Petition—Filed June 24, 1936

To the Honorable the Superior Court of the State of California, in and for the County of Los Angeles:

Your petitioners respectfully represent:

That the above mentioned E. C. Moore, I. Zellerbach, A. T. Jergins, are the duly appointed, qualified and acting Fish and Game Commissioners of the State of California, and constitute the Fish and Game Commission of said State;

That said purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, the respondent herein, is and was at all times herein mentioned an appliance used for the taking and catching of fish;

That heretofore, to-wit: on the 18th day of June, 1936, in the waters of the State of California, in said County of Los Angeles, to-wit: District 20, and within three miles [fols. 2-5] of the Catalina Island shore line Fish and Game District 20, said purse seine net, the respondent herein, was then and there used and maintained wilfully and unlawfully by Jack Borich and other parties unknown to your petitioner, contrary to the provisions of the existing statutes and laws of the State of California for the protection of fish, as follows, to-wit: In violation of the provisions of section 842 of the Fish and Game Code of the State of California.

That your petitioners herein, acting by and through L. G. Smith, a duly appointed, qualified and acting Assist-

ant County Fire and Game Warden of the County of Los Angeles, State of California, and a duly appointed, qualified and acting Volunteer Fish and Game protector of the Division of Fish and Game, Department of Natural Resources, did then and there seize and take said respondent, and said L. G. Smith has ever since kept and now has the same in his possession and under his control. That said L. G. Smith did thereupon forthwith report such seizure to your petitioners herein. That said respondent was at all times herein mentioned and now is a public nuisance.

Wherefore, Your petitioners pray for a judgment of this Court adjudging said respondent a public nuisance, and forfeiting the same and ordering the destruction or sale of the whole or any part thereof.

U. S. Webb, Attorney General of the State of California; Paul D. McCormick, Deputy Attorney General, Attorneys for Petitioners.

(Verified.)

[fol. 6] In Superior Court of Los Angeles County

[Title omitted]

Order for Hearing—Filed June 24, 1936

The verified petition of E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, having been filed in this Court on the ~~22nd~~ 24th day of ~~July~~ June, 1936, alleging that the respondent above named was seized by and upon the authorization of said petitioners while used and maintained in the waters of said County of Los Angeles, and of the State of California, wilfully and unlawfully and in violation of the existing statutes and laws of the State of California for the protection of fish; and praying for a judgment of this court, declaring said respondent to be a public nuisance, and forfeiting the same and ordering the destruction or sale of the whole or any part thereof:

Now, therefore, Wednesday, the 22nd day of July, 1936, in Dept. L. B. "A" at 10 o'clock A. M., of said day, and/~~the court robin~~ of the Superior Court of the State of California, in and for

City of Long Beach

[fol. 7] the County of Los Angeles, in the ~~County of Los Angeles, State of California,~~ are hereby fixed as the time and place for the hearing of said petition.

Dated June 24th, 1936.

L. E. Lampton, Co. Clerk, by Henry O. Minton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

[File endorsement omitted.]

[fol. 8] In Superior Court of Los Angeles County

[Title omitted]

Notice of Hearing—Filed June 24, 1936

Notice is hereby given, That on Wednesday, the 24th day of June, 1936, E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, filed a verified petition in the Superior Court of the State of California, in and for the County of Los Angeles, directed to said Court, the substance of which petition was and is, that on the 18th day of June, 1936, in the waters of the State of California, in said County of Los Angeles, to-wit: Pacific Ocean within three miles of the Catalina Island shore line, Fish and Game District No. 20, said purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, the respondent herein, was then and there used and maintained wilfully and unlawfully by Jack Borich and other parties unknown to your petitioner, contrary to the provisions of the existing statutes and laws of the State of California for the protec-[fol. 9] tion of fish, as follows, to-wit: In violation of the provisions of section 842 of the Fish and Game Code of the State of California.

That said respondent was and is a public nuisance and the judgment of the Court is asked declaring said respondent a public nuisance, and forfeiting the same, and ordering the destruction or sale thereof.

And all persons will take notice that Wednesday, the 22nd day of July, 1936, at ten o'clock a. m. of said day, and the court room of the Superior Court of the State of California,

Long Beach L. B. A. in and for the County of Los Angeles, in the said County of Los Angeles, State of California, have been fixed as the time and place for the hearing of said petition.

Dated: June 24th, 1936.

L. E. Lampton, Co. Clerk, by Henry O. Minton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

[File endorsement omitted.]

[fol. 10] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AFFIDAVIT OF POSTING NOTICE—Filed July 22, 1936

STATE OF CALIFORNIA,
County of Los Angeles, ss:

John Alley, being first duly sworn, deposes and says:

That he is a person over the age of 18 years and not a party to the within action; that he posted true copies of the Petition, Order for Hearing and Notice of Hearing in the within action in the City of Long Beach, County of Los Angeles, in three conspicuous places, to-wit:

County Clerk's Office, Jergins Trust Building;
City Hall, Long Beach;
Pine Avenue entrance, first floor, Jergins Trust Building,
on the 24th day of June, 1936.

John Alley.

Subscribed and sworn to before me this 20th day of July, 1936. Kathryn Buckman, Notary Public in and for said County and State. (Seal.)

[fol. 11] [File endorsement omitted.]

[fol. 12] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

CLAIM—Filed July 22, 1936

Now appear C. J. Hendry Company, a corporation, and Frank Sematovich by C. J. Hendry Company, a corporation,

intervening for the interest of themselves as owners of the said respondent purse seine net, and make claim to the said purse seine net as the same is held by the Fish and Game Commission of the State of California, petitioners in the above entitled cause, pursuant to proceedings under Section 845 of the Fish and Game Code of the State of California; and that the said claimants were at the time of the filing of the petition herein, and still are, the true and bona fide owners of the said net.

[fol. 13] Wherefore, they pray to defend accordingly.

C. J. Hendry Company. By Wm. J. Maggio.
Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants

(Verified.)

[fol. 14] Received copy of the within Claim this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Gen. Attorney for ——.

[File endorsement omitted.]

[fol. 15] In Superior Court of Los Angeles County

[Title omitted]

Demurrer of Claimants—Filed July 22, 1936

Claimants above named demur to the petition herein upon the following grounds:

1. That the petition fails to state facts sufficient to constitute a cause of action.

2. That the petition fails to state facts sufficient to constitute a ground of forfeiture of the respondent net.

3. That the petition fails to state facts sufficient to constitute a cause of action within the jurisdiction of this court.

4. That the court has no jurisdiction of the respondent net or of the subject of this action.

Wherefore, the claimants pray that the respondent net be delivered to them and that they go hence with their [fol. 16] costs.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

The foregoing Demurrer is filed in good faith and in the opinion of the undersigned is well taken.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

Authorities

C. C. P. Sec. 430, Subd. 16, Fish & Game Code, Sec. 842.845.

Received copy of the within Demurrer this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Gen. Attorney for ——.

[File endorsement omitted.]

[fol. 17] In Superior Court of Los Angeles County

[Title omitted]

Answer of Claimants—Filed July 22, 1936

Come now the claimants, C. J. Hendry Company, a corporation, and Frank Sematovich, and in answer to the petition herein, admit, deny, and allege as follows:

I

Deny, generally and specifically, each and every allegation of the petition herein, and allege that the said net in the petition mentioned did not, nor did any part thereof, become forfeited in the manner and form as in the petition in that behalf alleged.

Wherefore, the claimants pray that the respondent net be delivered to them and that they go hence with their costs.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

[fol. 18]. (Verified.)

[fol. 19] Received copy of the within Answer this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Attorney for ——.

[File endorsement omitted.]

[fol. 20] In Superior Court of Los Angeles County

No. L. B. C. 7558

E. C. Moore, I. Zellerbach, A. T. Jerdens, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent,

C. J. Hendry Company, a corporation, and Frank Sematovich, *Claimants*

Opinion—August 17, 1936

On the question of fact raised in this proceeding, I am forced to the conclusion that the net in question was actually used in Fish and Game District 20 in violation of the Fish and Game Code.

After studying the very complete and able briefs filed by claimant, and the cases cited, I am of the opinion that the remedy provided in section 845 of the Fish and Game Code of the state, is not within the exclusive jurisdiction of the Admiralty Court of the United States, and that it is not a void exercise of the legislative power of the State of California.

[fol. 21] The authority of the state to make laws regulating and protecting fish within the jurisdictional limits of the state is not questioned, but it is seriously and ably contended that the remedy for enforcing forfeiture of the net used in violation of such police law is within the exclusive jurisdiction of the United States. I cannot agree with such contention.

I cannot see anything more involved here than the right of the state to enforce a violation of its laws by a civil action *in rem*, provided by the legislature. The mere fact that the forfeiture sought to be enforced is directed against an object which might be made the subject of the maritime and admiralty jurisdiction does not make a statutory cause of action to enforce the provision of the state law, a proceeding in admiralty.

A proceeding *in rem*, and this is clearly that, is not within the exclusive jurisdiction of the admiralty courts, even though in some particulars the machinery used is identical.

Such a remedy did not originate with the admiralty courts, but was adopted from the civil law. It is not a remedy afforded by the common law, but when used to enforce a right not maritime in its nature it is a remedy given by statute. (*The Moses Taylor*, 71 U. S. 411, 431; *The Hine v. Trevor*, 71 U. S. 555, 567.) In my opinion the case of *Smith v. Maryland*, 59 U. S. 71, cited by petitioners is ap-

[fol. 22] plicable and binding here. The laws of Maryland cited there created a remedy against the boat itself, if it was used in violation of the law, and the forfeiture of the boat, under such remedy was held not to conflict with the admiralty jurisdiction of the United States.

I see no merit in the other points raised by claimant. In view of the foregoing, judgment will be given as prayed. Attorney for petitioners will prepare findings.

Dated: August 17, 1936.

Harry R. Archbald, Judge.

[fol. 23] In Superior Court of Los Angeles County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed August 26, 1936

The above entitled cause came on regularly for hearing the 22nd day of July, 1936, in Department B of the above entitled court, the Honorable Harry R. Archbald, Judge presiding; U. S. Webb, Attorney General of the State of California, by Paul D. McCormick, Deputy Attorney General, appearing as attorneys for petitioners, and Sawyer & Cluff and Arch E. Ekdale appearing as attorneys for claimants; and evidence both oral and documentary having been introduced, and the cause having been submitted for decision, the court now makes its Findings of Fact as follows, to-wit:

[fol. 24] I

That E. C. Moore, I. Zellerbach, and A. T. Jergins are the duly appointed, qualified, and acting Fish and Game

Commissioners of the State of California and constitute the Fish and Game Commission of said State.

II

That respondent herein is a purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches.

III

That on the 18th day of June, 1936, in the waters of the State of California in the County of Los Angeles, and within Fish and Game District #20, and within one-half mile of the Catalina Island shoreline, respondent purse seine net was then and there used, maintained, and operated in catching and taking fish by a certain Jack Borich and other unknown persons; that at said time and said place said net contained approximately two tons of tuna fish.

IV

That while respondent purse seine net was being used, maintained and operated in catching and taking fish as aforesaid, L. G. Smith, the duly appointed, qualified, and acting volunteer Fish and Game Protector of the Division of Fish and Game, Department of Natural Resources of the State of California, did then and there seize and keep said respondent and did thereafter report said seizure to [fol. 25] petitioners herein.

And as Conclusions of Law from the foregoing facts, the court finds:

I

That the use of said purse seine net in taking and catching fish in Fish and Game District #20 was unlawful.

II

That respondent purse seine net is a public nuisance.

III

That said respondent purse seine net should be forfeited to the Fish and Game Commission of the State of California.

IV

That after said forfeiture, said respondent purse seine net should be sold or destroyed by the Fish and Game Commission of the State of California.

Dated: August 26th, 1936.

Harry R. Archbald, Judge of the Superior Court.

(Affidavit of service.)

[fol. 26] [File endorsement omitted.]

[fol. 27] In Superior Court of Los Angeles County

LB C 7558

E. C. Moore, I. Zellerbach, A. T. Jerdins, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

C. J. Hendry Company, a Corporation, et al., Claimants

Judgment—Filed August 26, 1936

The above entitled cause came on regularly for hearing on the 22nd day of July, 1936, before the Honorable Harry R. Archbald, Judge presiding; U. S. Webb, Attorney General of the State of California, by Paul D. McCormick, Deputy Attorney General, appearing as attorneys for petitioners, and Sawyer & Cluff and Arch E. Ekdale appearing as attorneys for claimants; and evidence both oral and documentary having been introduced, and the cause having been submitted for decision, the court having heretofore caused to be made and filed herein its written Findings of Fact and Conclusions of Law, and being fully advised,

Wherefore, by reason of the law and the Findings of Fact aforesaid,

[fol. 28] It Is Ordered, Adjudged And Decreed that respondent purse seine net, approximate length 325 fathoms,

approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, is a public nuisance; and

It Is Further Ordered that said respondent purse seine net be forfeited to the Fish and Game Commission of the State of California and said Fish and Game Commission of the State of California is hereby ordered to sell or to destroy said purse seine net.

Dated: August 26th, 1936.

Harry R. Archbald, Judge of the Superior Court.

O. K. J. T.

(Affidavit of service.)

[fols. 29-30] [File endorsement omitted.]

Entered Aug. 29, 1936. Docketed Aug. 29, 1936. Book 945, Page 328. By I. Bottomley, Deputy.

[fol. 31] In Superior Court of Los Angeles County

[Title omitted]

Notice of Appeal—Filed November 27, 1936

To the Clerk of the above entitled Court; to the Petitioners herein, and to U. S. Webb, Esq., Attorney General, and Paul D. McCormick, Esq., Deputy Attorney General, Attorneys for said Petitioners:

Each of you is hereby notified that the claimants above named, C. J. Hendry Company and Frank Sematovich, do hereby appeal to the District Court of Appeals of the State of California, for the Second District, from the judgment of the above entitled Superior Court, made on August 26, 1936, and entered on August 29, 1936, in Book 945 of Judgments, at Page 328, and from the whole of said judgment.

[fols. 32-38] Dated: November 27, 1936.

Sawyer & Cluff, Alfred T. Cluff, Arch E. Ekdale, Attorneys for said Claimants.

Received copy of the within Notice of Appeal this 27 day Nov., 1936.

U. S. Webb, by Paul D. McCormick, Deputy, per R. G., Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 39] IN SUPERIOR COURT OF LOS ANGELES COUNTY

Department LB-B

Hon. Harry R. Archbald, Judge

No. LB C-7558

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners,

vs.

PURSE SEINE NET, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

Statement of Evidence

Long Beach, California,
July 22, 1936.

The above entitled cause came on regularly for trial in Department B of the above Superior Court, the Honorable Harry R. Archbald, Judge presiding; the Petitioners being represented by Paul D. McCormick, for U. S. Webb, State Attorney General; the Respondent being represented by Arch E. Ekdale and Alfred T. Cluff. Thereupon the following proceedings were had and the following testimony adduced:

[fol. 40] L. G. SMITH, called as a witness on behalf of petitioners, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCormick:

Q. What is your business or occupation?

A. I am assistant Fish and Game Warden of the County of Los Angeles, and also work for the State as a voluntary deputy.

Q. You are ex-officio Game Warden of the Division of Fish and Game of the State of California?

A. Yes.

Q. Where are you located with reference to your employment?

A. My headquarters are at Avalon, Catalina.

Q. Calling your attention to on or about June 18th, 1936, did you have occasion on that date to take into your possession a purse seine net?

A. Yes.

Q. Will you explain to the Court just what you were doing on that occasion?

Mr. Ekdale: To which we object, no foundation laid, too general, vague, no opportunity to object to the questions.

(No ruling.)

Mr. McCormick: Calling your attention to June 18th, 1936 were you patrolling in the course of your duties on that date?

[fol. 41] Q. What time of the day or night were you engaged in such occupation?

A. That particular day we were out from early in the morning up until about noon and then I went home and took a little sleep, and went out again at three o'clock and worked from three o'clock on the 18th until late on the evening of the 19th.

Q. You mean early on the morning of the 19th?

Mr. Ekdale: Object to that.

Mr. McCormick: Withdraw the question. On this occasion that you were out in the course of your employment, did you board a boat?

A. Yes.

Q. What was the name of the boat?

A. Purse Seine Boat Reliance.

Q. Did you at that time ascertain the name of the Captain?

A. Yes.

Q. What was it?

A. Jack Borich.

Q. Were there other members of the crew on the boat at the time you boarded it?

A. Yes.

Q. How many?

A. I believe there were nine besides the captain.

Q. When you boarded the boat where was it located with [fol. 42] reference to Catalina Island?

A. It was lying a little less than half a mile offshore, from the westerly end of Empire Landing, that is on the land side of Catalina Island.

Q. With reference to Avalon, where was that?

A. It is northwesterly, on the same side of the island.

Q. Did you take any measurement or do anything to ascertain the exact position of the boat at the time you boarded it?

A. Yes, sir.

Q. Just what did you do?

A. I took a compass bearing from the location, or just this side of the location to Ship Rock, which was 286 degrees, and then I looked southeasterly, and saw that the boat was lying inside of the line from Ship Rock to Twin Rock.

Q. Where was that with reference to Avalon?

A. Southwesterly, along the same side of the island.

Q. By the way, was there anyone with you?

A. Yes, sir.

Q. Who was that?

A. Page, the boat engineer.

Q. The boat that you were on on that occasion, is that a County boat?

A. Yes, sir.

Q. Used by you during the course of your duties?

A. Yes, sir.

[fol. 43] Q. Did you on that occasion that you boarded the boat Reliance see a net?

A. Yes.

Q. In connection with the boat?

A. Yes.

Q. Was that net in the water?

A. A portion of it was. They had retrieved probably half of the net, and the other, approximately, half of it, was still in the water.

Q. Was there anything in the portion of the net which was in the water?

A. There were fish.

Q. What kind of fish?

A. Blue Fin Tuna.

Q. What did you do after you boarded the boat and saw this portion of the net in the water?

A. I located the captain and told him that he was violating——

Q. Just a minute.

Mr. Ekdale: I object to any conversation . . .

Mr. McCormick: Well, it is not important. Tell what you did, but don't give any conversation with Captain Borich or any of the other members of the crew.

A. I placed the captain and members of the crew under arrest, and told them to retrieve the net and take the fish out, and accompanied the boat back to Avalon and filed a complaint.

[fol. 44] Q. When the net was retrieved into the boat, were there any fish in it?

A. Yes, sir.

Q. Approximately how many pounds or tons?

Mr. Ekdale: Objected to as wholly immaterial.

Mr. McCormick: Certainly is not immaterial. It is our contention that we have a right to show it was being used for taking fish.

Mr. Ekdale: That does not go to that point, your Honor.

Mr. McCormick: Obviously, it does.

Mr. Ekdale: May I address the Court? The point is this: the mere fact that there were fish in the net does not indicate where they were taken, nor how, and the amount would not throw any light on whether there was a violation of the section.

The Court: I will overrule the objection. It might have quite some bearing [redacted] the case.

A. There was a little less than two tons of fish, blue fin tuna.

Mr. McCormick: You say that you took the boat to Avalon?

A. Yes, sir.

Q. And there at that time the net was still on the boat?

A. Yes, sir.

Q. And you took the net into custody as the County Game Warden, and ex-officio State Game Warden?

Mr. Ekdale: Object to that as leading and suggestive.

[fol. 45] The Court: Sustained.

Mr. McCormick: After you arrived at Catalina, was the net still on board the boat?

A. Yes.

Q. Did you do anything with reference to the net thereafter?

A. Yes, I put an evidence tag on the net, and after the trial——

Q. I don't care about the trial. Just talking about the net.

A. Then we convoyed the ship back to San Pedro and late on the afternoon of the 19th turned the net over to the Division of Fish and Game.

Q. You say you turned over the net to the Division of Fish and Game, at San Pedro?

A. Yes.

Q. Anyone in particular?

A. Captain Groat was in charge and I made out the condemnation papers and he took charge of the net after that.

Q. Will you tell us the approximate dimensions of this net?

A. I never measured it. The captain told me it was 325 fathoms long——

Q. Just from your own personal knowledge.

Mr. Ekdale: May the answer as far as given be stricken out?

[fol. 46] The Court: Stricken out.

A. A little over 300 fathoms long, and approximately, 40 in depth.

Q. What mesh?

A. The mesh, I did not measure it, but from looking at it I imagine it was about seven to eight.

Q. And it was a purse seine net?

A. Yes, sir.

Q. Did you take any bearings or any other measurements other than you have testified with reference to the location of the boat and the location of the net at the time you first boarded the Reliance?

A. No more than just looking toward Shore and seeing that it was just off of the cliff between The Quarry and Empire landing to get the exact position along the shore.

Q. Did you arrive at any opinion as to the approximate distance of the boat from the shore line?

Mr. Ekdale: To which we object, no foundation laid. Calling for the conclusion of the witness.

Mr. McCormick: I think he can give his opinion. It is a matter of common knowledge that a person can testify to the speed of an automobile and he certainly can testify to the approximate distance.

The Court: Overruled.

A. I took the bearing to Ship Rock, and determined that they were inside of the line from Ship Rock to Twin Rock, [fol. 47] and by placing a straight edge on the chart it showed that it could not be over half a mile from shore.

Q. Have you had experience in matters of that kind?

A. Yes.

Q. What has that been?

A. Well, we used that method of determining the location of every boat suspected of fishing in the closed area. We have used that method for approximately seven years.

Q. How long have you been engaged in this occupation of yours?

A. Almost eight years.

Q. And you have taken bearings with reference to the distance of a boat from the shore line?

A. Yes.

Q. And its relative position with reference to adjoining waters?

A. Yes.

Q. Could you state how many such measurements you have taken?

A. Oh, a hundred, a hundred and fifty, or more.

Mr. McCormick: That is all.

[fol. 48] Cross examination.

By Mr. Ekdale:

Q. Mr. Smith, do you recall the home port of the boat you approached?

Mr. McCormick: Object to that as immaterial.

Mr. Ekdale: For the purpose of identification. It is painted on the stern of the vessel; compelled to be there by law.

Mr. McCormick: I cannot see where that is material here.

The Court: I can see how it might have something to do with the observation of the witness, credibility of the witness. Overruled.

A. I don't remember the exact home port, but it was not San Pedro.

Mr. Ekdale: Don't you recall it being on the stern, RELIANCE, and underneath the home port?

A. Yes, but I have seen so many—Tacoma—Seattle——

Q. There are several ships by the name RELIANCE, possibly the same size as this vessel.

Mr. McCormick: Incompetent, irrelevant and immaterial. No bearing on the issues of the case.

Mr. Ekdale: Cross examination. Goes to the credibility of the witness.

The Court: It goes further than that. I think I will sustain the objection.

Mr. Ekdale: Can you tell us the size of this vessel?

[fol. 49] A. Never measured it.

Q. In your opinion?

A. About 70 feet.

Q. Beam?

A. Probably 12 or 13.

Q. Draft?

A. Possibly eight or nine feet.

Q. What hour of the night or day was it on the 18th when you first saw the vessel?

A. It was about eleven forty-one or forty-two in the evening. If was eleven forty-five when I boarded the vessel, and I had seen it a few minutes before that.

Q. Had you seen it prior to eleven forty-one?

A. I say, I can't give it as being eleven forty-one exactly. It was a few minutes before eleven forty-five.

Q. Was it dark?

A. Quite dark. Starlight.

Q. Lots of breeze?

A. No breeze.

Q. Any current along that shore?

A. There was none that night.

Q. What means did you take to check that?

A. I could see the cliff.

Q. How do you know from looking at the cliff whether or not there was a current?

A. If there was a current the vessel would drift.

[fol. 50] Q. You saw the boat at about what time?

A. I boarded it at eleven forty-five, and could see the cliff directly astern of the vessel.

Q. Other than that, you made no check of it?

A. No, sir.

Q. Had you made any check earlier in the evening?

A. Check of what?

Q. Of the tide or current?

A. No.

Q. Do you recall what the tide was on that night?

A. No.

Q. Do you know when ebb or low tide was?

A. No.

Q. Didn't you check that at any time during the evening?

A. No.

Q. Do you know how long it takes to purse in a net, and bring it aboard with two tons of fish in it, assuming no difficulties in doing it?

Mr. McCormick: Objected to as immaterial.

The Court: Overruled.

A. Probably an hour and a half.

Mr. Ekdale: Does it ever take less than that to purse in a net, and bring it aboard?

A. I have seen it done in an hour and a half.

Q. Isn't it a matter of several hours?

A. I don't think that is the ordinary length of time, [fol. 51] because there is a variation, with the fish in the net. The more fish, the longer it takes to haul in the net.

Q. Will a vessel drift faster or slower with the net in the water?

A. I can't say as to that. I can't say as to that. I don't think it would have any effect.

Q. Don't you know that a net of the size that you have described has a cork and lead line on it?

A. Yes.

Q. About a thousand pounds of lead on it?

A. I don't know how much. I would say probably a ton and a half of lead.

Q. And with a net some 300 fathoms long, aren't you prepared to say as a man of the sea, whether that net in the water would retard or speed up the drift of the vessel?

A. I can't see that it would have any effect if there were no surface conditions.

Q. You have had some experience in manning vessels?

A. Yes.

Q. Do you know whether a deep keeled vessel will drift faster than a shallow?

A. The deep keel would drift faster.

Q. Do you think it would make no difference, if there was a heavy net fastened to the vessel, that it would make no difference in the drift of the vessel?

A. Depends on the wind. If you have no wind, it cer-
[fol. 52] tainly would not have much effect on the drift of the vessel.

Q. The wind itself would decide entirely whether there was any drift?

A. The wind will drift the vessel, if there is any wind.

Q. Ever read the Pacific Coast Pilot?

A. Parts of it.

Q. You keep a manual on board ship?

A. At times.

Q. Did you ever read the table of currents relating to the Pacific coast?

Mr. McCormick: Objected to as immaterial. That type of question obviously calls for the conclusion of the witness.

The Court: What is the contention?

Mr. Ekdale: I contend that there is no proof so far where these fish were caught, and I am trying to show by this man what a net will do in the water——

The Court: Well, I think it would have some bearing in that respect. Overruled.

Mr. Ekdale: Did you see any of these fish caught?

A. No.

Q. Can you get a fish in or out of the net other than by taking them in or out like the fish get in ordinarily?

A. They can't get in.

Q. They can get out?

A. Not except there is a hole in the net.

Q. Did you see the net at the time it was pursed?

[fol. 53] A. No.

Q. You don't know where it was pursed, nor when?

A. No. I have my idea.

Q. But did you see it?

A. No.

Q. Then you don't know of your own knowledge where the net was pursed, nor when?

A. No.

Q. There are quite extensive currents along this island?

A. At times.

Q. And they apparently are without prediction as to which way they run or where they run?

Mr. McCormick: Objected to as immaterial.

The Court: I will overrule the objection.

The Witness: The question is not clear.

Mr. Ekdale: I will reframe it. You say you are not familiar with the Pacific Coast Pilot published by the United States Government?

A. Not entirely.

Q. You have not read the paragraph on currents?

A. No.

Q. But you have been around here for several years?

A. Yes.

Q. And making arrests for fish and game violations for four or five years?

A. Yes.

[fol. 54] Q. And you have been familiar with those waters for some period of time?

A. Yes.

Q. But you have never read the section or paragraph on currents, in the Pacific Coast Pilot?

A. No.

Q. Would you say it was a fair statement that there is an estimated velocity of three quarters of a knot prevailing along that line?

Mr. McCormick: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McCormick: Stipulated that the same objection may be deemed to be made to all questions concerning currents and drift?

The Court: Yes.

Mr. Ekdale: Would you say that that was a fair statement that there is a prevailing current of about three-quarters of a knot along this area of the coast?

A. In what direction?

Q. South, southeast.

A. No, I would not say there is a prevailing current. The current changes in a few minutes.

Q. Irrespective of the wind?

A. Yes.

Q. Changes with the tide?

[fol. 55] A. Well, just a minute. I would not say it would change with the tide. I have seen it change during the same tide.

Q. And at times there will be eddy currents which carry any floating objects in or out at an unpredictable rate, irrespective of wind velocity, or these general conditions?

A. I would say parallel to the shore. I would not say in or out. In some cases, a little bit.

Q. Haven't there been lots of vessels wrecked along that coast, for that reason, that the current carries the vessel in?

A. I can't say.

Q. Isn't it true that during foggy or thick weather, that the currents are still there, and isn't it true that the same conditions prevail when it is flat calm?

A. I have never noticed it in foggy weather, but I have noticed it in calm weather.

Q. Isn't it true that early in the morning along this section of Catalina Island, or at night, when there is no prevailing westerly breeze, that a light or floating object starting three or four miles out will tend to follow right straight up the coast to Long Point?

A. You have various currents.

Q. Isn't that the usual situation that it will carry it in and up?

A. No, I don't think that is the usual situation. I have [fol. 56] seen them go one way as many times as the other.

Q. But the current tends to carry them in more often than out?

A. I could not say about that. I don't know.

Q. Were you aboard the vessel Reliance when it came from Avalón to San Pedro?

A. No, sir.

Q. Did you take the net off of the vessel Reliance?

A. No, sir.

Q. As far as you know it has always been on the Reliance?

A. Yes. I have not seen the net since I turned it over to the Fish & Game Commission.

Q. At that time the net was still aboard the vessel?

A. Yes.

Q. And the vessel was in command of its captain?

A. No, I don't think the captain was there, or any of the crew.

Q. You took the vessel and let the crew go ashore?

A. *I* did not.

Q. Weren't you aboard?

A. Not at the time I turned it over to the Commission. They had left.

Q. They brought it back to San Pedro, 26 miles, and they were in charge of the vessel at all times during that trip, and they had the net aboard?

A. Yes, sir.

[fol. 57] A. Do you know whether it is a fact that after the vessel was brought back, and tied up to the wharf, whether two or three or four or five days elapsed before the net was taken off the vessel?

A. I don't know.

Mr. McCormick: Objected to as immaterial.

The Court: He says he don't know, anyway.

Mr. Ekdale: You say that the first time you saw the vessel Reliance, was probably ten minutes or so before you boarded it?

A. That night.

Q. And that was approximate eleven forty-one to five p. m., on June 18th?

A. Yes.

Q. And at that time the vessel was where?

A. It was directly offshore from the cliff, from the westerly end of Empire Landing, approximately half a mile from shore.

Q. How did the compass bear?

A. 286.

Q. Did you take any other bearing?

A. No.

Q. Did you swing the needle to a second point?

A. No, I did not need that. I took the bearing astern, and it was directly offshore from the cliff.

Q. What cliff?

[fol. 58] A. Between The Quarry and Empire Landing.

Q. Are you telling me that the cliff is directly in line with Ship Rock?

A. No, I said it was directly offshore from the cliff.

Q. And you took a compass bearing——

A. From the location to Ship Rock.

Q. You were guessing at the angle toward the cliff?

A. Yes, but I was directly offshore, and the front of the vessel was on the line from Twin to Ship Rocks.

Q. Then the compass bearing was the same to Twin Rock as to Ship Rock?

A. Yes.

Q. What was it?

A. 180 degrees.

Q. Did you take it by compass?

A. It would not be necessary.

Q. Explain your answer.

A. If I am on a direct line from one point to another, midway between the two points, if I am directly in line, the line only has one bearing.

Q. A straight line between the two points?

A. Yes.

Q. How far were you from the Reliance?

A. Probably 20 feet.

Q. But you did not take any bearings after that?

A. No instrument bearings.

[fol. 59] Q. And you have no way of knowing how far you were from Ship or Twin Rocks?

A. No.

Q. But there is a varying distance between that line as drawn from the two points, to the shore, as you progress along the shore?

A. It is not over half a mile at any point as I remember it.

Q. There are other objects shown on the chart which you could have taken compass bearings to?

A. Not at that time, no, sir.

Q. There were none?

A. No, sir.

Q. The only objects you could see were the two points, Ship Rock and Twin Rock?

A. No. That is an ambiguous question. You could see lots of things besides that, but that is the only two points that I could see that I could take a bearing on. I could see another line of mountains, above.

Q. You could have seen the peak at the top of the mountain?

A. There is no peak shown on the chart that could be identified at night.

Q. No peaks shown on the chart?

A. Not in sight.

Q. Couldn't see Black Jack?

A. Certainly, but there was no point identifiable on the chart.

[fol. 60] Q. You have been in those water- four or five years?

A. Yes.

Q. But can't identify those peaks?

A. I could identify them to myself, but they are not shown on the chart.

Q. Just because you were on a line between Ship and Twin Rocks, and you took an angle bearing to Ship Rock, you took no other compass bearing?

A. No.

Q. And you were right alongside of the Reliance for how long?

A. Something over an hour. I don't remember the exact minutes.

Q. What did you do when you boarded the boat, with reference to the net?

A. Just looked at it.

Q. Was the net all aboard the boat at that time?

A. No.

Q. How many fathoms were off?

A. Probably half of it. Possibly 150.

Q. Was the ring or cork line or lead line aboard the ship?

A. Not the cork line but the lead line, which was the purse line.

Q. How much of the cork line was out?

A. Same amount as the net.

Q. It was all bagged up; no way for the fish to get in or out?

[fol. 61] A. No, sir.

Q. They were busy bringing the balance of the net back aboard the vessel?

A. Yes.

Q. How long did it take them to bring in the balance of the net, what was in the water?

A. Something over an hour. Probably an hour and five or ten minutes.

Q. And they had the cork line and the lead line aboard at the time you boarded it?

A. No, part of the cork line was out.

Q. But they had the purse line and the lead line in?

A. Yes.

Q. And it still took them an hour and ten minutes to bring in the balance of the net?

A. Yes.

Q. Do you have any way of fixing in your own mind how long it would have taken to bring in the net after it was set and pursed?

A. The first half of the net would go faster than the last half. Possibly half an hour more than that. An hour and forty-five.

Q. Over and beyond the hour ten?

A. No, probably thirty minutes — than I was aboard the vessel.

Q. You say you were aboard the vessel looking at the net. [fol. 62] What was the next step you took in relation to that net?

A. The next step was to put the evidence tag on the net.

Q. What do you mean by 'evidence tag'?

A. The tag which shows that this property is evidence. It shows the section that it is taken under, making it a misdemeanor, and so forth to fish in certain waters.

Q. All the matter on the tag relates to evidence?

A. Well, it gives the place to fill in the name filled out and so forth.

Q. Other than the descriptive matter, is there anything that would point out that the net is being held for evidence, as disclosed by the card?

A. That is all.

Q. And there is nothing else on it?

A. No.

Q. After you tagged the net, what did you do with the net then? Incidentally, did you wait until they had the net all on board the vessel before you put the tag on it?

A. Yes.

Q. And then what did you do? Did you stay aboard the vessel?

A. Yes.

Q. At all times until it was delivered at San Pedro?

A. No, sir.

Q. Or any of your deputies?

A. No, not all the time. There was probably twenty min-
[fol. 63] utes when my deputy stayed on board and watched the boat.

Q. But he did not stay on board the vessel?

A. Only except that twenty minutes.

Q. During that twenty minutes he was on board?

A. Yes.

Q. Who was that deputy?

A. I had two. One was Mr. Page and one was Mr. Shelton.

Q. Both of them were present at all times?

A. Yes.

Q. Until the vessel was delivered at San Pedro, from the time you boarded it between Ship Rock and Twin Rock?

A. Yes, as far as I know. If I was not there I could not swear that they were there, but they said they were.

Q. When the vessel got back to Avalon, you left the vessel?

A. Yes.

Q. You did not go back aboard the vessel after that?

A. Surely.

Q. When?

A. I don't believe I was off the vessel again until it arrived at San Pedro and then we took turns guarding the net on the vessel at San Pedro.

Q. At the time the net was back on board the vessel, and it started for Avalon, who was in charge of the navigation?

A. The Captain. There was some of us aboard the vessel
[fol. 64] all the time it was under way.

Q. Were you aboard the vessel from the time of the boarding by you around eleven forty-five until the vessel arrived at Avalon?

A. Yes.

Q. But you did not come back with the vessel from Avalon?

A. Convoyed it back with the patrol boat.

Q. But you did not stay aboard?

A. No.

Q. The vessel was in charge of its captain?

A. Yes, but my engineer was riding with him. He was aboard.

Mr. Ekdale: That is all.

Redirect examination.

By Mr. McCormick:

Q. At the time you boarded the boat, did you have any conversation with the captain or members of the crew?

A. Yes, sir.

Q. Approximately how long did that conversation take place?

Mr. Ekdale: Objected to as immaterial.

Mr. McCormick: You brought this up yourself, and we have a right to go into to. I am not asking for the conversation. It is just a preliminary question.

The Court: Overruled.

[fol. 65] A. I can't say how long it lasted.

Mr. McCormick: Approximately.

A. Half the time I was aboard the vessel.

Q. You said at the time you boarded the vessel the members of the crew were engaged in pulling the net in?

A. Yes.

Q. Did they stop doing that when you boarded the boat?

A. No, they continued.

Q. Did they continue during the entire time that you were on the boat?

A. Yes, sir.

Q. And you said it took about an hour and ten minutes to get the remainder of the net in, which was in the water at the time you boarded the vessel?

A. Yes.

Q. Then after this hour and ten minutes, did you start for Avalon?

A. Yes.

Q. Did you take any measurements at that time to ascertain your location?

A. No instrument bearings, no, sir.

Q. Did you observe by your eyes where you were?

A. Yes, sir.

Q. Could you tell us whether or not the boat had drifted?

A. It had not.

[fol. 66] Q. In other words, it was substantially in the same place as it was at the time you boarded it?

A. Yes.

Q. And you noticed and observed that fact?

A. Yes.

Q. Was there any anchor on the boat?

A. It was not anchored.

Q. Free in the water?

A. Yes.

Q. I just want to clear this point up. Did I understand you in your testimony to say that you turned the net over to Captain Groat?

A. Yes.

Q. Where did you turn the net over?

A. At San Pedro.

Q. The net was the same you had placed the tag upon on that particular night?

A. Yes, sir.

Q. Were you present when the net was actually removed from the vessel?

A. I was not.

Q. You testified you had a conversation with the captain?

A. Yes, sir.

Q. Who was present besides yourself on that occasion?

A. I did not notice who was around. There were the crew members and Mr. Shelton was there at the time.

[fol. 67] Q. He was your engineer?

A. Mr. Page was the engineer. He was in the boat, sometimes alongside of us and sometimes in front of us, with the patrol boat.

Q. Were the crew in hearing of that conversation?

A. Yes.

Q. State the conversation.

Mr. Ekdale: Objected to as incompetent, irrelevant and immaterial, and hearsay, as against the owners of the net.

Mr. McCormick: The theory upon which I asked the question is this: that as I have heretofore stated, this proceeding makes no distinction between the owner of the net or any person who happens to be using it and therefore it is incumbent on the petitioners to bring out whether it was actually being illegally used. If someone other than the owner was using the net, as the evidence shows, I think any statements with reference to the use of the net would be admissible as showing that the net was being illegally used, and therefore the conversation would be admissible.

Mr. Ekdale: How would it be bound up by a conversation with some third party. Purely hearsay.

The Court: It is an action against the net itself.

Mr. McCormick: Yes, it is in-rem action. It is a question of the forfeiture of the net.

Mr. Ekdale: The owners could not be bound by the testimony of some third party. Supposing, we will say, that [fol. 68] there was a guest on board the vessel, and he said, "Sure, I was using the net". Does that make it the subject of forfeiture as against us? A net of over a thousand dollars in value?

The Court: No, I don't think that would, but I can see how possibly the other might. I will allow you to raise that question in the briefs. Overrule the objection at this time.

Mr. McCormick: State the conversation.

A. The first thing that I said to the captain, I asked him if he was the captain, and he said he was. I told him he was under arrest, and also the members of his crew, for fishing in District 20 with a purse seine net; and I asked him how he came to commit the violation, and he said, "What are you going to do?" Some of the other boats do it." Then he said he would rather go to San Pedro than Avalon. And I told him he would have to go to Avalon, which we did, and then we talked some about the fish, how to determine what variety of fish it was, maybe by the glow that they made in the water at night, and so forth; and after we got on the dock, I believe it was, he turned to me and said—thanked me for giving them halfway decent treatment, and shook hands with me, telling me that ordinarily the officer tried to bulldoze a man who had done something he should not have done, and wanted to know how long he would be detained, and I told him no longer than was necessary to complete the action. I be- [fol. 69] lieve that was about all.

Q. Did he in that conversation state to you that he knew he was in a restricted area?

Mr. Ekdale: Objected to as leading and suggestive; already asked and answered.

The Court: Sustained.

Mr. McCormick: Do you remember any other conversation at that time that you have not related?

Mr. Ekdale: The witness has already stated that that was all.

Mr. McCormick: I know, but after all he might have missed something.

Mr. Ekdale: If you want to tell him about it, all right.

The Witness: Well, I asked him why he did it, and he said, "What are you going to do. You have to make a living." He said, "Some of the other boats had done it," the same way they had, and asked me what the penalty had been on the two boats where the captain had been arrested about ten days previous to the time of his arrest, and I told him the disposition of the cases.

Q. Is that all you remember of the conversation?

A. That is about all.

Mr. McCormick: That is all.

[fol. 70] Mr. Ekdale: How many seizures of nets have you made over at Catalina?

Mr. McCormick: Objected to as incompetent, irrelevant and immaterial. No possible bearing on the case.

Mr. Ekdale: I think I can show what has happened on another net—I want to show what the difference is between the two. If it is not material, it may go out.

The Court: I don't see how it can be material, what they did on another net. Sustained.

Mr. Ekdale: You have said that while you were aboard the vessel, it did not drift. Did you take any other sights?

A. No more than watching the shore line.

Q. Was there a moon?

A. No, there was starlight.

Q. And you watched the shore to see whether there was a drift?

A. Yes.

Q. As a matter of fact there is less drift close to the shore than two or three miles out?

A. That is a rather ambiguous question.

Q. I will reframe it. The current that is running around Catalina and its adjacent islands, is far stronger more than two and a half miles out, then in close to the shore?

A. Not always.

Q. You would not say that is the general rule?

A. No.

[fols. 71-97] Q. Do you have any idea of the value of a new net like this one?

Mr. McCormick: Objected to as immaterial.

The Court: Sustained.

Mr. Ekdale: That is all.

Mr. McCormick: At the time you boarded the boat did you have any conversation with either the captain or the members of the crew with reference to the location of the boat?

A. No, not as to just where it was.

Mr. McCormick: That is all.

[fol. 98] IN DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Civil No. 11319

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximate Length 325 Fathoms, Approximate Depth 32 Fathoms, Approximate Size of Mesh 5 to 8 Inches, Respondent,

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMATOVICH, Claimants and Appellants

OPINION—Filed January 31, 1940

The petitioners sued to have adjudged forfeited to the State Fish and Game Commission a purse seine net used by the owners unlawfully for fishing in the waters of the state. The petitioners had their judgment.

The single question stated by appellants in their opening brief is whether the state courts have jurisdiction of the proceeding. Asserting that the fishing net was a part of the "apparel and furniture" of a sea going vessel, the appellants advance the argument that the federal courts alone have jurisdiction of such forfeiture proceedings. Section 845 of the State Fish and Game Code provides for proceedings [fol. 99] in the state superior courts leading to the forfeiture, sale or destruction of nets in violation of the terms of the code. No provision is made for such proceedings in the federal courts, hence, the question here is whether the code sections are constitutional. Appellants concede the state's

power to regulate and control fishing and to forfeit the net, but they state that the forfeiture is a "cause of admiralty cognizance", and hence, that the state courts have no jurisdiction. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, and similar cases are cited holding that maritime contracts and torts are exclusively within maritime jurisdiction. We do not find that any of these cases have any bearing upon the question before us. The controlling authority is Smith v. Maryland, 59 U. S. 71, involving a state statute providing for the forfeiture of a scoop or drag used for catching oysters within state waters. The point involved was whether the statute conflicted with the federal jurisdiction in admiralty. At page 76 the court says: "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the [fol. 100] jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." To the same effect are Manchester v. Massachusetts, 139 U. S. 240, 260; and Miller v. McLaughlin, 281 U. S. 261, 74 L. Ed. 840. This language is found on page 264 of the latter decision: "The claim under the 14th Amendment is also groundless. A state may regulate or prohibit fishing within its waters. (Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559 * * * and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor." (Citing cases.)

The supreme power of the state to regulate and control fishing within its territorial waters cannot be denied. Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 80 L. Ed. 772.

For these purposes the state has policing jurisdiction of [fol. 101] these waters, and to accomplish the end may enact such reasonable police regulations as it may deem proper. Thus the state may prohibit the use of dynamite or fire arms for taking fish within its waters, and may seize and confiscate such articles if necessary to make its regulations effective. The code sections fixing the procedure for the forfeiture of nets unlawfully used in fishing within its territorial waters are justified upon the accepted doctrine that the power to make regulations includes the power to enforce them. In such legislation there is no conceivable conflict with the admiralty jurisdiction of the United States.

It is argued that the petition is insufficient because it does not specifically allege that the net was used "in taking fish." The charging part of the petition is that it was used "wilfully and unlawfully * * * contrary to the provisions of the existing statutes * * * in violation of the provisions of section 842 of the Fish and Game Code * * *." This is not a criminal proceeding. The pleading meets all the requirements of section 845 of the Fish and Game Code. The petition acquainted the owners with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the net. Such notice was all that the statute [fol. 102] required. People v. One 1933 Plymouth Sedan, 13 Cal. (2d) 565, 569.

There is no merit in the contention that this court is without jurisdiction to hear the cause. The appeal was taken to the district court of appeal of the second appellate district. That court, deeming that the cause was in equity, transferred it to the supreme court. That court transferred the cause here for determination. The appellant now contends that the cause is not one in equity, that jurisdiction of the appeal lay in the district court of appeal of the second district, and that its transfer by that court to the supreme court was therefore void. Under section 4c of Article VI of the constitution the supreme court has power to transfer any cause "pending" before it, or any cause "pending before a district court of appeal" to any other district court of appeal for hearing and decision. Under section 4a a district court may transfer a cause to the

supreme court if the appeal was not taken to the "proper" court. Hence, if the order of transfer from the district court to the supreme court was void because the cause was not in equity, then the order was ineffective and the cause was still "pending" in the district when transferred here by the supreme court. If that transfer was not void, but voidable by error, it has become valid by the lapse of the sixty day period. If the original transfer to the supreme court was valid, then, too, the transfer here from the latter [fols. 103-104] court was in accord with the constitutional provision. Any descriptive matter in the order of transfer is immaterial so long as the cause is identified and the purpose of the order is within the court's jurisdiction.

The judgment is affirmed.

Nourse, P. J.

We concur: Sturtevant, J. Spence, J.

[fol. 105] In Supreme Court of California. In Bank

D. C. A. 1st Dist., Div. 2. No. 11319. L. A. 16192.

Action Due: 3-30-40

Moore et al.

vs.

Purse Seine Net et al.

Order Granting Petition for Rehearing After Judgment in the District Court of Appeal—Filed March 30, 1940

Appellants' petition to have the above entitled cause heard and determined by this Court, after judgment in the District Court of Appeal of the 1st Appellate District, Division 2, is Granted, and said cause transferred to this Court for hearing and decision.

Dated March 29, 1940.

——, Chief Justice; Curtis, Justice; Edmonds, Justice; Houser, Justice, Carter, Justice.

[File endorsement omitted.]

[fol. 106] IN SUPREME COURT OF CALIFORNIA

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximately 325 Fathoms Long, 32 Fathoms Deep, Approximate Size of Mesh Five to Eight inches, Respondent, C. J. Hendry Company, a Corporation, and Frank Sematovich, Claimants and Appellants

OPINION—September 21, 1940.

In a statutory proceeding, a large purse seine net was adjudged forfeited to the Fish and Game Commission of the State of California because of a use which the court found was unlawful. The appellants were the owners of the net at the time it was seized.

The facts are undisputed, and the only question for decision is whether the court had jurisdiction to entertain the proceeding. The appellants do not challenge the state's power to regulate fishing in its territorial waters, to close [fol. 107] certain waters to fishing with nets, and to provide by law for the forfeiture of nets used in violation of its regulations. But they contend that as the present proceeding is one *in rem* against a thing maritime seized in navigable waters, the federal courts have exclusive jurisdiction.

When seized the net was being used by the purse seine fishing boat RELIANCE, on which it belonged in fishing operations. It is conceded that the boat was then within waters in which the taking of fish by net was unlawful.

The Fish and Game Commission filed its petition in the Superior Court reciting these facts and asking for a judgment declaring the net to be a public nuisance, forfeiting it, and ordering its destruction or sale. Upon the filing of this petition, the court ordered public notice of the time and place of its hearing to be given. On the day fixed, the appellants appeared and filed their claim as owners of the net. The judgment of forfeiture followed.

The principal contention of the appellants is that as the thing seized was part and parcel of a ship; the Superior Court has exercised admiralty jurisdiction in a proceeding

in rem brought to accomplish a maritime forfeiture of a maritime object in accordance with the conventional procedure of courts of admiralty. This, they say, constitutes [fol. 108] an invasion of the exclusive province of the United States courts upon whom admiralty jurisdiction is conferred by the Constitution of the United States and the acts of Congress. In support of the judgment, the respondent insists that as the state may validly legislate to protect fish and game, its courts may enforce the penalties of a statute enacted for that purpose.

In any maritime case there are two fields in which conflict may occur between the laws and judicial proceedings of a state and those of the United States. The first is in the field of substantive law. A state may not constitutionally adopt and enforce laws which materially interfere with the harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of Congress. This is not a conflict of jurisdiction and the question concerns only substantive law.

But conflict may occur in another field. As admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct proceedings according to the course of admiralty or administer admiralty remedies. Its proceedings are limited to those cognizable at common law.

In this case the appellants do not claim that there is any conflict between the substantive provisions of the California Fish and Game Code, under which the proceeding was brought, and maritime law. But lack of conflict in this [fol. 109] regard is not determinative of the case, for jurisdiction in admiralty depends upon maritime subject-matter and not upon the source or character of the substantive law which is being administered. If the property proceeded against is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within the maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the forfeiture is a law of the United States or of a state.

Admittedly the net in this case was seized upon navigable waters. The vessel from which it was taken was engaged in fishing, and the net was a part of her equipment. If it was necessary to the ship's enterprise and indispensable for the accomplishments of the objects of the particular voyage,

it was, in legal contemplation, a part of the vessel, although it was not required for navigation. (*Turner* vs. *United States*, 1928 A. M. C. 1089, 27 F. (2d) 134; *Buffalo*, 148 Fed. 331; *Edwin Post*, 11 Fed. 602; *Witch Queen*, 30 Fed Cas. 396.)

The true criterion by which to determine whether any vessel or its appurtenances is subject to admiralty is the business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion. "If the business or employment of vessels appertain to travel, or trade [fol. 110] and commerce on public navigable water, it is sufficient and the jurisdiction attaches." (*General Cass*, 10 Fed. Cas. 169, 170; *E. M. McChesney*, 8 Fed. Cas. 668; *Alabama*, 22 Fed. 449; *City of Pittsburgh*, 45 Fed. 699; *Public Bath No. 13*, 61 Fed. 692; 1 Benedict, *Admiralty*, 5th ed., p. 2.)

A fishing vessel leaves the mainland with her hatches empty and navigates to a place where the fish are abundant. She is then maneuvered so that the net encircles a school of fish. The fish are drawn aboard and transported back to land. This transportation is as essential a part of the fishing business as is the pursing and hauling in of the net and is certainly an activity in aid of trade and commerce. It is an essential step in getting the fish to market. Hence, at the time the net here in controversy was seized, it was a part of the appurtenances of the RELIANCE, or to use the phraseology of the American admiralty, a part of her "tackle, apparel and furniture". In legal contemplation it was a part of the vessel itself, just as were her engines, her stores and her navigation equipment, and a subject of admiralty jurisdiction.

However, a further question must be answered. Is this proceeding one which may be prosecuted in a state court?

Although by the Constitution of the United States, the jurisdiction of admiralty causes is vested in the federal [fol. 111] courts (art. III, sec. 2), by statute there is saved to suitors "the right of a common-law remedy where the common law is competent to give it" (28 Mason's U. S. C., sec. 371). But a decree *in rem* is not a remedy which the common law is competent to give; it is authorized only by the civil law. The Constitution "only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law

courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (*Moses Taylor*, 71 U. S. 411.)

This rule was followed and applied in California as early as 1871 (*Crawford* vs. *The Bark Caroline Reed*, 42 Cal. 469). Later in *Fischer* vs. *Carey*, 173 Cal. 185, jurisdiction of an action for partition of a vessel was disclaimed, although it was one in equity against a personal defendant. The court pointed out that although the action was personal in form, in substance it was a suit *in rem*, and any decree of the court would act directly upon the vessel by taking it into the custody of the court, through a receiver, and ordering a sale. This was held to be an invasion of the exclusive jurisdiction of the courts of admiralty. To the same effect is the case of *Glide*, 167 U. S. 606, where the [fol. 112] court decided that although a state may enact a law providing for a lien against a ship, it may only be enforced in a federal court of admiralty. And in a more recent consideration of the rule as it applies to facts substantially identical with those now before the court, the conclusion was reached that a state court has no jurisdiction in a proceeding brought for the forfeiture of a fishing boat for violation of a state law. In that case the facts showed that the boat was seized upon the charge of fishing without a license. The director of fisheries of the State of Washington filed a petition in the Superior Court of that state praying for the confiscation and forfeiture of her engines, tackle, apparel, furniture, equipment, and seine net. The state court was denied jurisdiction (*Bessie Mac.*, 1938 A. M. C. 77, 21 F. Supp. 220).

The respondent relies on *Smith* v. *Maryland*, 59 U. S. 71, where, it is true, the court held that a state law did not conflict with the jurisdiction of admiralty. But this case has been overruled by the later decisions which are directly to the contrary. It was pointed out in the *Glide case, supra*, that the question whether a claim of a maritime nature could be enforced in the state courts by process *in rem* under a state statute creating a right in the thing itself was not brought to the court directly until the cases of the *Moses Taylor, supra*, and *Hine* vs. *Trevor*, 71 U. S. 555. In the [fol. 113] first, it was determined that a suit against the

vessel or thing is a proceeding *in rem* and is not a remedy afforded by the common law, hence, the admiralty court had exclusive jurisdiction. Later in the same term, the court in *Hine* vs. *Trevor, supra,* decided that as the vessel was sued in a state court for a tort arising from a collision, the judgment should be reversed and remanded with directions to dismiss for want of jurisdiction. The remedy pursued, said the Court, partook of all the essential features of an admiralty proceeding *in rem* which is in no sense a common-law remedy so as to come within the exemption of the law which "saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

For these reasons, the judgment must be reversed with directions to the Superior Court to dismiss the proceeding. As one acknowledged authority upon admiralty law has written, "The right to proceed *in rem* is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty: no state can confer jurisdiction upon its courts to proceed *in rem*, nor could Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the Federal Government." (1 Benedict, *Admiralty*, 5th ed., sec. 23.) See, also, *Knapp, Stout & Co.* vs. *McCaffrey*, [fols. 114-115] 177 U. S. 638; *Crawford* v. *Bark Caroline Reed, supra.*

It is so ordered.

Edmonds, J.

We concur: Gibson, C. J. Shenk, J. McComb, J. pro tem.

[fol. 116] In Supreme Court of California. In Bank

[Title omitted]

Order Vacating Judgment—Filed October 21, 1940

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside.

Gibson, Chief Justice. Shenk, Justice. Curtis, Justice. Traynor, Justice. Carter, Justice.

Dated: Oct. 17, 1940.

[File endorsement omitted.]

[fol. 117] IN SUPREME COURT OF CALIFORNIA. IN BANK

L. A. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, Petitoners and Appellees,

vs.

PURSE SEINE NET, Approximately 325 Fathoms Long, 32 Fathoms Deep, Approximate Size of Mesh Five to Eight Inches, Respondent, C. J. Hendry Company, a Corporation, and Frank Sematovich, Claimants and Appellants

OPINION—Filed October 20, 1941

California law enforcement officers seized a large purse seine fishing net in use on the fishing boat "Reliance" in navigable waters of the Pacific Ocean adjacent to Catalina Island. The taking of fish by net within these waters is unlawful. (Fish and Game Code, sec. 842). The California Fish and Game Commission filed a petition in the Superior Court asking for a judgment to declare the net a public nuisance forfeited to the State, and to order its destruction or sale under the provisions of section 845 of the Fish and Game Code. A judgment of forfeiture issued from which the owners of the net have appealed. They do not challenge [fol. 118] the power of the state to enact legislation regulating fishing within territorial waters and providing for the forfeiture of nets used in an illegal manner, but they contend that the state court has no jurisdiction to proceed in the action because it is a maritime cause of action within the exclusive admiralty jurisdiction of the federal courts.

Section 9 of the Judiciary Act of 1789 and later statutes re-enacting the same provision (Judicial Code, secs. 24 (2), 256; 28 U. S. C. A. 41, subd. 3, 371) provide that the federal district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." (See *The Moses Taylor*, 4 Wall. 411.) The present proceeding involves a maritime cause of action. If the property proceeded against is an integral part of the vessel or its equipment and is seized on navigable waters the cause is maritime. (*Turner* v. *U. S.*, 27 Fed. (2d) 134; *The Buffalo*,

148 Fed. 331; *The Witch Queen*, 30 Fed. Cas. 396.) This fact alone, however, does not establish that the action is within the exclusive jurisdiction of the federal courts. The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued [fol. 119] is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law (*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109), including equity. (*Knapp-Stout & Co.* v. *McCaffrey*, 177 U. S. 638.)

If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action. (Reynolds v. Steamboat Favorite, 10 Minn. 100, 193; N. J. Steam Nav. Co. v. Merchant's Bank, 6 How. 344, 390; Percival v. Hickey, 18 Johns (N. Y.) 257; 1 Kent Com. 367, 377; 1 Story, Constitution, 533. See Am. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99; Fisher v. Boutville Trans. & Towing Co., 162 Fed. 994; International Nav. Co. v. Lindstrom, 123 Fed. 475; The Harrisburg, 119 U. S. 213; The Hamilton, 207 U. S. 398; Aurora Shipping Co. v. Boyce, 191 Fed. 966.) "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away." (Benedict, Admiralty (5th ed.) sec. 23. See Knapp-Stout & Co. v. McCaffrey, supra; Red Cross Line v. Atlantic Fruit Co., supra.) The fact that federal forfeiture statutes, similar to [fol. 120] that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (See The Sarah, 8 Wheat. 391; U. S. v. The Betsy and Charlotte, 4 Cranch 433; The Confiscation Cases, 7 Wall. 454; U. S. v. La Vengeance, 3 Hall 297; U. S. v. Grundy, 3 Cranch 337; The Palmyra, 12 Wheat. 1) does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy.

It is therefore necessary to determine whether this forfeiture proceeding by the state is the type of action which was cognizable in a common law court. In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (Martin v. Superior Court, 176 Cal. 289; People v. Richardson, 138 Cal. App. 404.) Other jurisdic- [fol. 121] tions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the Mother Country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, et seq.)

Appellants' contention that the present proceeding is of a type unknown to the common law courts because it is an action in rem against the net itself rather than in personam against the owners of the net is unsound. While it is true that actions in common law courts are usually in personam as contrasted to the in rem proceedings of the courts of the Admiralty, it has long been established that an action in rem can be brought by the State in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The Statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships "under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the aforesaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel;* one third part thereof to his Majesty, [fol. 122] his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or

goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record*, by bill, information, plaint or other action, wherein no essoin, protection or wager of law shall be allowed;". (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts. In the case of Roberts v. Withered (1696) 5 Mod. 193; 12 Mod. 92; L. Salk 223, it was held that in proceeding to forfeit a ship and cargo under the above act, an action of detinue would properly lie in the court of the King's Bench. "* * * for My Lord Coke (b) was of the opinion, that the bringing a replevin is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring detinue for it." This decision was approved in Wilkins v. Despard, 5 Durnf. & East's Rep. 112.

Such forfeiture to the State of illegally used articles has [fol. 123] continued as an accepted common law procedure. The statute of 13 & 14 Car. II. c. 7, 11, 18, 20 (8 English Statutes at large) provided for the forfeiture in common law courts of various articles used in violation of law, certain types of vessels being included in chapter 11. The Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) imposes, as part of the penalty for smuggling, forfeiture to the Crown of the goods smuggled and the *ship, boat*, carriage, or horse used for their conveyance. Chapter 36, par. 218 of the act provides: "All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts * * * may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the *High Court of Justice in England, the superior courts of common law* at Dublin or Edinburgh * * * or by information in the name of some officer of Customs or Excise, before *one or more justice or justices* in the United Kingdom, the Isle of Man, or the Channel Islands * * *." (Italics added.) (See 9 Halsbury's Laws of England 377; Frailey v. Charlton (1920) 1 K. B. 147.) While this statute is of recent origin, it indicates that at the present time in England forfeiture proceedings against

vessels and cargo are instituted in common law courts rather than courts of admiralty. (See also Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, s. 14 as amended, 1923, 13 & 14 Geo. 5, c. 5, s. 2 (1); 22 Halsbury's laws of England 399.)

[fol. 124] In the United States the federal government from early times has provided for the forfeiture of certain articles used in violation of law. (See 14 Stat. L. 156; 14 Stat. L. 151, 165; 13 Stat. L. 240; 14 Stat. L. 178; 12 Stat. L. 319; The Sarah, 8 Wheat. 391. See also Internal Revenue Code secs. 3720 et seq., 2154, 2155 et seq.; 26 U. S. C. A. 339, 552, 553; 19 U. S. C. A. 1088.) California has likewise exacted forfeiture of various illegally used articles. (Pen. C. sec. 325 (1872); Health and Safety Code secs. 12304-5 (former Stats. 1887, ch. 95, p. 110); Health and Safety Code sec. 11610.) The early federal statutes required that in the trial of cases involving seizures made on waters navigable by vessels of ten tons burden and upward the court sit as a court of admiralty (See The Sarah, supra; Reynolds v. Steamboat Favorite, supra, 193), but the federal cases themselves recognize that such forfeiture proceedings constituted a valid remedy at common law. Thus, in the case of The Palmyra, supra, Mr. Justice Story stated: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. * * * In the contemplation of the common law the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem cognizable on the revenue side of the exchequer. The thing is here pri- [fol. 125] marily considered as the offender, or rather the offense is attached primarily to the thing." (See U. S. v. 5 Boxes of Asafoetida, 181 Fed. 561; The Sarah, supra.)

There are cases which state that an in rem action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (The Moses Taylor, supra; The Ad. Hine v. Trevor, 4 Wall. 555; The Glide, 167 U. S. 606; The Belfast, 7 Wall. 624.) These cases, however, were concerned with types of in rem proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action in rem against a vessel when such action has no counterpart in the common law courts.

(See Knapp-Stout & Co. v. McCaffrey, supra.) But these cases are not controlling in circumstances where the common law provided an analogous remedy. As stated by the Supreme Court of Minnesota in Reynolds v. Steamboat Favorite, supra: "In England in the court of exchequer, and in the United States in the district courts in seizures made on land for violation of the revenue laws, the proceedings are in rem, according to the course of the common law. Though a proceeding is in rem, it is not necessarily a proceeding or cause in admiralty. The Sarah, 8 Wheat. 391; United States v. 422 Casks of Wine, 1 Peters, 547; L. Kent Comm. 374-5-6."

[fol. 126] The courts of other jurisdictions with statutes similar in nature to the one now under consideration have enforced such forfeitures under the assumption that they had jurisdiction to do so. (See State v. Umaki, 103 Wash. 232; State v. Mavrikas, 148 Wash. 651; Sterrett v. Gibson, 168 S. W. (Tex. Civ. App.) 16, aff'd 172 S. W. 1198. See also Mirkovich v. Milnor, 34 Fed. Supp. 409; Dick v. Anderson, 57 Cal. 251.). In the case of The Bessie Mac, 21 Fed. Supp. 220, a federal district court held that forfeiture proceedings under a Washington statute similar in nature to that of California were maritime in nature and should therefore be brought in a federal court. The court, however, failed to consider whether such proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act.

It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act. (Red Cross Line v. Atlantic Fruit Co., supra.)

Appellants contend that the petition for forfeiture filed by the Fish and Game Commission did not allege that the purse seine net in question was used for the taking of fish and therefore failed to state a cause of action. The petition stated, however: "That said purse seine net • • • [fols. 127-128] is and was at all times herein mentioned an appliance used for the taking of fish" and "was • • • used in violation of the provisions of Section 842 of the Fish and Game Code of the State of California." This constitutes a sufficient allegation that the net was illegally used to catch fish.

Since the judgment of forfeiture in the instant case pronounced the net in question a public nuisance pursuant to section 845 of the Fish and Game Code which declares any net used in violation of law to be a public nuisance, the action is one to abate a nuisance and therefore within the appellate jurisdiction of the District Courts of Appeal. (Cal. Const. Art. 6, sec. 4 b.) Although the original appeal was improperly transferred to this court by the District Court of Appeal of the Second Appellate District, this court on November 20th, 1939, transferred the cause to the District Court of Appeal of the First Appellate District. The case is now here by virtue of an order granting a hearing after decision by that court. This court therefore has jurisdiction for all purposes. (Cal. Const. Art. 6, sec. 4 c.)

The judgment is affirmed.

Traynor, J.

We Concur: Gibson, C. J. Curtis, J. Carter, J.

[fol. 129] In Supreme Court of California. In Bank

Order Due Nov. 19, 1941

[Title omitted]

Order Denying Rehearing—Filed November 18, 1941

Appellants' petition for a rehearing is Denied.
Edmonds, J., voted for a rehearing.

Dated Nov. 17, 1941.

Shenk, Acting Chief Justice.

[File endorsement omitted.]

[fol. 130] IN SUPREME COURT OF CALIFORNIA

Los Angeles No. 16192*

On Appeal from the Superior Court in and for the County of Los Angeles. (Superior Court No. LB-C-7558)

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners, Respondents,

vs.

PURSE SEINE NET, etc., Respondents,

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMALOVICH, Claimants, Appellants

REMITTITUR

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles, in the above entitled cause, be and the same is hereby affirmed.

Respondents to recover costs on appeal.

[fol. 131] I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 20th day of October, 1941, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 21st day of November, A. D. 1941.

B. Grant Taylor, Clerk, by L. F. White, Deputy.
(Seal.)

[fol. 132] [File endorsement omitted]

[fol. 133] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 22, 1942

To the Honorable, the Chief Justice of the Supreme Court of the State of California:

Your petitioners, C. J. Hendry Company, a corporation, and Frank Sematovich, respectfully show:

I

Your petitioners are the owners of the purse seine net, respondent herein, and claimants and appellants in this cause.

[fol. 134] The appellees above named filed a petition in the Superior Court of the State of California, in and for the County of Los Angeles, on June 24, 1936, praying that the respondent purse seine net be adjudged forfeited to the State of California. The appellants duly appeared in said proceeding, claimed the respondent net as owners thereof, and, after hearing, judgment was rendered therein in favor of the appellees adjudging the respondent net to be forfeit to the State of California.

An appeal from said judgment to the District Court of Appeal, for the Second Appellate District, of the State of California, was duly transferred to the Supreme Court thereof; thereafter transferred by the Supreme Court to the District Court of Appeal, for the First Appellate District, for hearing and determination, and said judgment was affirmed by said District Court of Appeal. Thereafter, on petition of the appellants, the Supreme Court of the State of California ordered said cause transferred to it for hearing and determination, and thereafter, by judgment rendered on October 20, 1941, said Supreme Court affirmed the said judgment. Thereafter your petitioners, the appellants, applied for a rehearing, which was denied by the said Supreme Court on November 18, 1941.

II

In said cause there is drawn into question the validity of [fol. 135] a statute of the State of California, to-wit, Section 845 of the Fish and Game Code of California, on the ground that as construed and applied herein it is repugnant to the Constitution and laws of the United States, to-wit, Article III, Section 2, of the Constitution of the United States, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction and to those parts of Sections 24 and 256 of the Judicial Code of the United States vesting exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction in the District Courts of the United States, and the decision herein is in favor of the validity of said state statute.

And your petitioners pray for the allowance of an appeal from the final judgment of the Supreme Court of the State of California herein to the Supreme Court of the United States for the reasons specified in the assignments of error and the statement of the basis of jurisdiction filed herewith, in order that the decision of the Supreme Court of the State of California may be examined and reversed; that an order be made fixing the amount of security which the petitioners, as appellants, shall give and furnish on said appeal; and that a transcript of the record, proceedings and papers herein, duly authenticated, be sent to the Supreme Court [fol. 136] of the United States, as provided by law.

Dated: January 15, 1942.

Alfred T. Cluff, Arch E. Ekdale, Attorneys for Petitioners and Appellants, C. J. Hendry Company, a corporation, and Frank Sematovich.

In Supreme Court of California

Order Allowing Appeal

The appeal prayed for is hereby allowed and cost bond on appeal fixed in the sum of $250.00.

Dated: January 19, 1942.

Gibson, Chief Justice of the Supreme Court of the State of California.

[fol. 137] [File endorsement omitted.]

[fol. 138] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENTS OF ERROR ON APPEAL TO UNITED STATES SUPREME COURT—Filed January 22, 1942

The appellants, C. J. Hendry Company, a corporation, and Frank Sematovich, assign the following errors in the record and proceedings in this cause:

1. The Supreme Court of the State of California erred in holding and adjudging that Section 845 of the Fish and Game Code of California was valid to confer jurisdiction upon the Superior Court of the State of California, in and for the County of Los Angeles, to hear and determine the [fol. 139] petition herein, and to adjudge and decree the forfeiture of the respondent net to the State of California.

2. The said Supreme Court erred in failing to hold and adjudge that the Superior Court was without jurisdiction of the subject matter of the proceeding herein; that under the Constitution and laws of the United States jurisdiction of said subject matter was vested exclusively in the district courts of the United States sitting in admiralty; and that Section 845 of the California Fish and Game Code was invalid to confer jurisdiction of said subject matter in the said Superior Court, and so applied was repugnant to the Constitution and laws of the United States.

3. The said Supreme Court erred in holding and adjudging that the proceeding in the Superior Court against the respondent net herein was "a traditional common law remedy" and a remedy saved to suitors in causes of admiralty cognizance by Sections 24 and 256 of the Judicial Code of the United States.

For which errors the appellants pray that the said judgment of the Supreme Court of the State of California, dated October 20, 1941, in the above entitled cause be reversed, and that a judgment be rendered directing the

[fol. 140] dismissal of the proceeding herein for lack of jurisdiction.

Dated: January 15, 1942.

Alfred T. Cluff, Arch E. Ekdale, Attorneys for Appellants, C. J. Hendry Company, a corporation, and Frank Sematovich.

[fol. 141] [File endorsement omitted.]

[fols. 142-143] Citation in usual form showing service on Eugene M. Elson filed Jan. 29, 1942, omitted in printing.

[fols. 144-153] Bond on appeal for $250.00 approved Jan. 19, 1942, omitted in printing.

[fol. 154] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND DESIGNATION OF PARTS OF THE RECORD—Filed April 13, 1942.

On their appeal to the Supreme Court of the United States herein, the appellants intend to rely upon the following points:

I

The cause of action herein is of maritime cognizance and the remedy sought was a remedy *in rem* against a *res* maritime. Jurisdiction of such a cause rests exclusively in the [fol. 155] United States District Courts, sitting in admiralty.

II

The remedy provided by Section 845 of the California Fish and Game Code, which was sought by the petitioners in this proceeding and adjudged to them by the California Superior Court, is not a "common law remedy" and is not within the exceptions of the saving clauses contained in Sections 24-(3), and 256-(3) of the Judicial Code of the United States.

The appellants hereby designate the following parts of the record, which they deem necessary for a consideration of the foregoing points:

1. Appellants' Jurisdictional Statement, with copies of the opinions of the state courts appended thereto. (R. 4).

2. Petition for Appeal and Order Allowing Same. (R. 77).

3. Assignments of Error. (R. 83).

4. Citation. (R. 88).

5. Statement Directing Attention to Rule 12 (3). (R. 92).

6. Appellants' Cost Bond on Appeal. (R. 201).

7. The following papers from the Clerk's Transcript in the Superior Court:

(a) The Petition. (R. 99).

[fol. 156] (b) Order for Hearing. (R. 117).

(c) Notice of Hearing. (R. 119).

(d) Affidavit of Posting Notice. (R. 124).

(e) Claim. (R. 121).

(f) Demurrer of Claimants. (R. 107).

(g) Answer of Claimants. (R. 104).

(h) Findings of Fact and Conclusions of Law. (R. 109).

(i) Judgment. (R. 113).

(j) Notice of Appeal. (R. 126).

8. The following portions of the Reporter's Transcript:

Testimony of L. G. Smith. (R. 135-66).

9. This Statement and Designation.

NOTE: Wherever it is consistent with the practice of the Court, will the Clerk please eliminate in the printed record all verifications (substituting the word "verified"), all proofs or acknowledgments of service (substituting therefor the words "affidavit of service" or "service acknowledged") and all duplications of captions.

Dated: April 3rd, 1942.

Arch E. Ekdale, Attorney for Appellants. Alfred T. Cluff, of Counsel.

[fol. 157] Service of the foregoing Statement and Designation is acknowledged this 7th day of April, 1942.

Earl Warren, Attorney General of the State of California. Everett W. Mattoon, Assistant Attorney General, By Eugene M. Elson, Deputy Attorney General. Per Ry.

[fol. 157a] [File endorsement omitted.]

[fol. 158] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—April 13, 1942

Appeal from the Supreme Court of the State of California

Treating the appeal papers herein from the Supreme Court of the State of California as an application for a writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: Enter Arch E. Ekdale. File No. 46,411. California Supreme Court. Term No. 1083. C. J. Hendry Company and Frank Sematovich, Petitioners, vs. E. C. Moore, I. Zellerbach and A. T. Jergens, as the Fish and Game Commission of the State of California. Filed March 30, 1942. Term No. 1083 O. T. 1941.